

*Beyond the Indian Act: Restoring Aboriginal Property Right*  
by Tom Flanagan, Christopher Alcantara, and Andre Le  
Dressay

## BOOK REVIEW

*Beyond the Indian Act: Restoring Aboriginal Property Rights*  
Tom Flanagan, Christopher Alcantara, and Andre Le Dressay

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*Beyond the Indian Act* is an interesting, provocative and easily readable book. Using cases drawn from contemporary First Nation development, the authors argue that the restoration of property rights to Indian lands is the key to economic prosperity for First Nations peoples. They argue without full property rights, First Nations communities cannot use their lands effectively in creating economic wealth. Their proposal is that First Nations individuals ought to be able own their own land in fee simple as other Canadians are able to. Reversionary or underlying title would rest with First Nations. In the case of sales of lands to non-First Nation individuals or entities or defaults on lands First Nations Councils continue to have jurisdiction over the land. It is not removed from their authority. In this sense, it is similar to the sale of lands in other parts of Canada. If land in Saskatchewan is sold to a person from Ontario, the Saskatchewan land is not transferred to Ontario. Saskatchewan laws remain in effect and the owners are expected to respect Saskatchewan law, not Ontario law.

This short 200 page book consists of three parts: The first, Peoples and Property, is a historical examination of property rights in general as well as a discussion, using anthropological evidence, of property rights in traditional Aboriginal societies. This section ends with a review and analysis of the attempt to create individual

property rights in the United States of America through the Dawes Act in the 1930s. For those interested in history, it is an informative read. The second section, Limited Property Rights under the Indian Act, focuses on Canada and property rights under the Indian Act. It discusses custom land rights, certificates of possession and leases and ends with a discussion of the recently enacted First Nations Land Management Act. Again, this historical information is an easy read. The final section, Beyond the Indian Act contains the proposal for the restoration of First Nations property rights. It starts with a discussion of markets and why they don't work on Indian reserves, using developments at Kamloops and Squamish to illustrate the difficulties of making markets work, moves to a discussion of the ways in which First Nations communities have attempted to use comprehensive land claims and amendments to the Indian Act to enable First Nations land to be used for development. The proposal for a First Nations Property Ownership Act is contained in the final chapter.

### THE FIRST NATIONS PROPERTY OWNERSHIP ACT

Since the Royal Proclamation of 1763, Indian lands have been set aside from the main eco-

conomic space of Canada and have had a restricted set of property rights. Fee simple title, necessary to unlock the capital within, is not one of the property rights enjoyed by First Nations individuals or Bands. Since 1969, with a growing emphasis on economic development and resolution of land claims, there have been several proposals which attempt to do this and at the same time respecting the desire for protection of the land in the case of default or sale. The authors argue that the way forward is to find a way to bring Indian lands into the market in a way that can be used to wealth. They recommend the creation of a system of property rights that provides a fee simple title to land for individuals and a reversionary right to Indian Bands. They propose the passage of a First Nations Property Ownership Act as a way of enacting this system in Canada. This would provide, on a voluntary basis, a fee simple title for individuals for Indian land and a reversionary title to Indian Bands in the event of sale or default by individuals or others.

Flanagan et al. recommend that the new Act encompass the following principles:

1. First Nations must gain fee simple ownership title over their current lands.
2. Individual First Nations must have underlying title in their land, so that when there is an issue where individual title is lost or removed by someone else, the title to land reverts back to the First Nation. This involves all of the accompanying responsibility of taxation and management.
3. There should be a Torrens style land title system to manage and record transactions.
4. All accompanying legislation should seek to harmonize provincial and First Nations jurisdictional gaps to provide for investment certainty.
5. It should be an optional piece of federal legislation that releases communities from the land governance parts of the Indian Act.

### THE TORRENS SYSTEM

Flanagan et al. recommend the use of a Torrens land-title system rather than a deeds system. The fundamental difference between the Torrens system and other land registry systems is that only

the act of registration can change ownership of land, not a private agreement between sellers. The determination of validity of title is undertaken by the registrar at the time of application rather than by the purchaser at the time of purchase. This system is based on elements that generate secure title such as registration, certainty of title in the registry, a system of priorities for ranking competing interest, and assurance that the registered owner is the true owner of the title. This is much different than the current land registry system under the Indian Act that is considered to be a deeds system. In this system, the registrar files the records but does not determine their legality nor does the registrar have any involvement in the effect of these documents. The risk lies mostly with the parties to the transaction.

### FOUNDATION IN HERNANDO DE SOTO ECONOMIC THEORIES

In general, the Flanagan proposal represents one of the latest proposals for converting “Lands reserved for Indians” into lands where Indian individuals and Bands enjoy full property rights. The underlying premise of the text is based on the work of respected Latin American economist Hernando de Soto’s *The Other Path* (1986) and *The Mystery of Capital* (2000). De Soto argues that one of the reasons why urban slum dwellers in the third world are so poor is that they suffer from a deficient system of property rights that prevents them from using their small parcels of land or houses as collateral in loans and hence they are unable to “unlock” the capital contained within them. The establishment of property rights that are “secure, easily defined, enforced and traded” (2010: 171) is the foundation of modern Aboriginal economies. Flanagan/Jules sees Indian reserve lands as representing “unlocked capital” as a result of the restrictive property right provisions of the Indian Act. Unlocking them requires the development of a new regulatory environment for Indian lands. Unlocking them in enables “ownership of underlying title by First Nations Governments and secure individual property ownership affirmed by guaranteed title.” (2010: 169)

### NEED FOR MORE DISCUSSION

In the context of the evolving and complex arena of Aboriginal property rights, Aboriginal and treaty rights, self-government and treaty negotiations and as an expression of a way of moving forward in a modern capital economy, the ideas contained within the Flanagan proposal are worth further consideration and discussion. Defined, secured and enforceable property rights are foundational to participation in modern market economies. It is important to understand that Aboriginal political objectives are broader than economic development. Protection and enhance-

ment of cultural property, equitable distribution of wealth, enhancement of individual choice, development of accountable and effective First Nations governments are also important goals that need to be examined as well when considering such fundamental issues of land reform. Balancing First Nations cultural values and customs with contemporary individual rights is also an important aspect to be explored in some depth. The wholesale adoption of a new system of property rights, however attractive, ought to occur with informed public discussion and debate.